No. 12,430

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee); HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING WITH REGARD TO APPELLEE ROBINSON.

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APPELLANT'S PETITION FOR A REHEARING WITH REGARD TO APPELLEE ROBINSON.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, William Patrick Brandhove, hereby petitions this Honorable Court for rehearing in the above-entitled cause with regard to appellee Elmer E.

Robinson pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit, and his petition respectfully shows:

I.

INTRODUCTORY STATEMENT.

It is respectfully submitted that, if the heretofore settled law as to the requirements of a conspiracy and the pleading of a claim for relief for conspiracy are applied to this case, such conspiracy has been properly pleaded against appellee Robinson requiring a rehearing in this cause. In support of this statement it will be necessary to discuss the substantive law and the rules of pleading relating to conspiracies, as well as the application of both to appellant's pleadings concerning appellee Robinson.

II.

A CONSPIRACY IS AN AGREEMENT OR UNDERSTANDING BETWEEN TWO OR MORE PARTIES TO DO AN UNLAWFUL THING, OR TO DO A LAWFUL THING IN AN UNLAWFUL MANNER; THE CONSPIRACY IS COMPLETE ON THE FORMING OF THE AGREEMENT OR UNDERSTANDING, AND THE PERFORMANCE BY ANY CONSPIRATOR OF ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY.

(A) Historically the writ of conspiracy was employed in the case of combinations of two or more persons to abuse legal procedure. When the law developed, an action on the case was fashioned to extend criminal liability as well as liability in Court beyond the active wrongdoer to those who have planned, assisted or encouraged his acts.

The historical development of the responsibility of the conspirator in tort actions and criminal actions

has been stated by Prosser, On Torts, p. 1095, as follows:

> "The original writ of conspiracy was employed only in the case of combinations of two or more persons to abuse legal procedure, and was the forerunner of the action for malicious prosecution. This was replaced at a later date by an action on the case in the nature of conspiracy, and the word gradually came to be used to extend liability in tort, as well as crime, beyond the active wrongdoer to those who have merely planned, assisted or encouraged his acts."

(B) Where there was an agreement or understanding relating to the commission of a tort or crime, responsibility as a conspirator attaches to every one participating in such agreement or understanding if any of the participants has taken action to effect the object of the conspiracy.

In *Pinkerton v. United States,* 151 F. (2d) 499, the Court stated at p. 501:

> "'A "conspiracy" is an agreement [or understanding] between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner'. (Words and Phrases, Perm. Ed., Vol. 8 'Conspiracy', page 718.) 'The conspiracy is complete on the forming of the criminal agreement, and the performance of at least one overt act in furtherance thereof'. Hall v. United States, 10 Cir., 109 F. 2d 976, 984."

It is immaterial who has taken the overt act required. As also stated in *Pinkerton v. United States,* supra, at p. 500:

> "Although conspiracy be not charged, if it be shown by the evidence to exist, *the act of one or*

more defendants in furtherance of the common plan is in law the act of all. (Davis v. United States, 5 Cir., 12 F. 2d 253, 257.)" (Emphasis added.)

These rules are in harmony with the law as pronounced by the United States Supreme Court in the same case. In the words of the United States Supreme Court:

"The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under Section 37 of the Criminal Code, 18 U.S.C.A. Section 88, 7 F.C.A. title 18, Section 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case." (*Pinkerton v. United States of America,* 328 U.S. 640, 647, 90 Law. Ed. 1489, 1496-1497.) See also, *Fiswick v. United States of America,* 329 U.S. 211, 216, 91 Law. Ed. 196, 200.

Where there is a wrongful agreement or understanding, it is therefore immaterial whether a particular defendant who participated in the agreement or understanding, did any overt act to effect the object thereof. If any other participant in the agreement or understanding took action, any acts of such other participants for the purpose of effecting the objects of the agreement are to be considered as acts of each participant.

(C) It is immaterial whether each of the conspirators acting alone could have committed the crime or tort in question; it is undisputed that a defendant may be charged with a conspiracy if he participated in an agreement or understanding relating to an offense or tort which one of his coconspirators could commit.

As stated in *Johnson v. United States,* 158 F. 69:

> "A defendant therefore may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his coconspirators could commit." See also *Downs v. United States,* 3 F. (2d) 855, 857; *Picking v. Penn. Railway Co.,* 151 F. (2d) 240; 11 *Am. Jur.* 547, footnote 7; 5 *A.L.R.* 787; 74 *A.L.R.* 1114.

The same rules apply to an action in damages for conspiracy as to a criminal action for conspiracy. (*Reitmeister v. Reitmeister,* 162 F. (2d) 691; *Connolly v. Gishwiller,* 162 F. (2d) 428.)

III.

IN A CONSPIRACY CASE FACTS MUST BE PLEADED CONNECTING EACH OF THE DEFENDANTS WITH THE ALLEGED UNLAWFUL AGREEMENT OR UNDERSTANDING, THE PURPOSE OF THAT AGREEMENT OR UNDERSTANDING, THE CONDITION OF MIND OF A CONSPIRATOR AND AT LEAST ONE OVERT ACT OF ANY OF THE CONSPIRATORS TO EFFECT THE PURPOSE OF THE CONSPIRACY.

(A) Where a conspiracy is alleged, the objective as well as subjective elements of the conspiracy must be properly pleaded.

A cause of action for conspiracy involves objective as well as subjective elements. The objective facts required for such a cause of action are the existence of an unlawful agreement or understanding and an overt act to effect the object thereof. Subjectively, a defendant cannot be made responsible as a conspirator unless he has taken part in an express or tacit agreement or understanding in the state of mind of a conspirator. The above elements must therefore be pleaded.

(B) In pleading the objective elements of a conspiracy the defendant must be connected with the express or tacit agreement; the purpose and the unlawfulness of the agreement must appear and at least one act taken by one of the conspirators in effectuating the purposes of the agreement.

"There must be alleged certain acts of each of the alleged conspirators which would connect him or it with the conspiracy, and after the conspiracy has once been shown to exist, the overt act of any one of the alleged conspirators would be binding upon all". *U. S. v. Griffith Amusement Co.*, 3 Fed. Rules Serv. 12 e 231, Case 5.

"The rule seems to be in conspiracy cases that—if the pleader sets out with reasonable certainty and definiteness the various causes which resulted

in his injury and connects the plaintiff's (defendant's) joint action with the same, and if from all of the allegations of the complaint considered together, the defendant is reasonably informed of the character of the charges, so that he will be enabled to prepare for his defense—the pleadings should be sustained." *Johnson v. Minnesota Amusement Co.,* 3 Fed. Rules Serv. 8 a 477, case 2.

"There is no justification for dismissing a complaint for insufficiency of statement, *except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim.*" (Emphasis added.) *Continental Collieries v. Shober,* 130 F. (2d) 631, 635; see, *MacDonald v. Winfield Corp.,* 12 Fed. Rules Serv. 12 b 34, case 3, 82 Fed. Supp. 929.

(C) In determining the requirements as to the pleading of the objective elements of a conspiracy, weight must be given to the consideration that conspiracy is generally locked within the breasts of the conspirators and must therefore be inferred from circumstances.

In shaping the requirements as to the pleading of an agreement or understanding in the nature of a conspiracy, Courts have never ignored what has been drastically stated in *Lange v. Heckel,* 171 Wis. 59, 64, 175 N.W. 788, 789, as follows:

"Conspiracy is a line of endeavor the success of which is not promoted by advertising. Direct proof of the illegal combination is generally locked within the breasts of the conspirators, and the ultimate fact of the corrupt agreement, if proved at all, must be inferred from established facts and circumstances."

This statement of the Wisconsin Court has been cited with approval in *Connolly v. Gishwiller,* 162 F. (2d) 428, 433. In the same case the Court of Appeals for the Seventh Circuit cited with approval from *People v. Small,* 319 Ill. 437, 449, 150 N.E. 435, 440:

> "Considered separately the acts of a conspiracy are rarely of an unequivocally guilty character, and they can be properly estimated only when connected with all the surrounding circumstances."

In the words of the Court of Appeals in the *Connolly* case at page 433:

> "A conspiracy is very nearly always from the nature of things, provable only by circumstantial evidence, by inferences reasonably deducted from facts proven. *It may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation, the intimacy and relation of the parties at the time of the commission of the acts, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy."* (Emphasis added.)

See also *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-399, 92 Law. Ed. 746, 765-768. In that case the United States Supreme Court restated the rule that to prove a conspiracy in violation of the anti-trust laws, proof of an express understanding that each party would sign improper agreements is unnecessary, and that, when a group of competitors enter into a series of separate but similar agreements with competitors or others, a strong inference

arises that such agreements are the result of concerted action, which inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan. Because the District Court in that case had not followed this rule, a great number of its findings were repudiated by the United States Supreme Court.

It can hardly be questioned, therefore, that where the collective interest of the alleged conspirators clearly appears together with the intimacy and relation of the alleged conspirators at the time of the commission of the tort and their close cooperation with regard to the overt acts effectuating the alleged conspiracy, it cannot be required of a plaintiff to allege in his pleadings all details of the unlawful agreement or understanding. If the circumstances under which the understanding took place and its unlawful purposes are pleaded, a pleader has done everything that can be reasonably required of him.

(D) Rule 9 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States governs the pleading of the subjective elements of a conspiracy.

Rule 9 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States provides among other things:

> "Malice, intent, knowledge and *other condition of mind of a person may be averred generally.*" (Emphasis added.)

It follows that evidentiary facts or any other facts concerning a conspirator's state of mind at the time

of the unlawful agreement or understanding need not be pleaded, but that it is sufficient to plead that the person charged as a conspirator acted with the same intent as the actual wrongdoers.

In refuting a construction contrary to the clear wording of the rule, it was stated in *Love v. Comm. Cas. Ins. Co.*, 26 Fed. Supp. 481, 482:

> "The rule above quoted, however, is very clear and is not open to any such construction as contended for by the defendants. This rule very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22, which provides that, whenever it is material to allege malice, etc. it shall be sufficient to allege same as a fact without setting out the circumstances from which it is to be inferred."

In discussing the rule, the commentator of the Federal Rules states:

> "Conditions of the mind such as malice, intent, or knowledge may be averred generally since specific averment is normally well nigh impossible, unless all the evidence bearing thereon is set out at length." 2 Moore, Fed. Practice, 2d Ed., Sec. 9.03 and cases cited in footnote 15 at p. 1911.

IV.

IN THE LIGHT OF THE SUBSTANTIVE LAW AND THE RULES OF PLEADING APPLICABLE TO AN ACTION FOR CONSPIRACY IT CAN HARDLY BE QUESTIONED THAT APPELLANT HAS SUFFICIENTLY STATED HIS CASE AGAINST APPELLEE ROBINSON.

This Court mentions in its opinion the fact that appellee Robinson was not himself acting officially or under color of authority. No holding is based or could be based on this fact. The other defendants unquestionably wielded state power or acted under color of authority, so that if a conspiracy existed between Robinson and them, it makes no difference with regard to the responsibility of Robinson as a conspirator that he, acting alone, could not have committed the alleged tort. It cannot be seriously contended, that a special rule applies to conspiracies relating to violations of the Civil Rights Act, and that with regard to such conspiracies, each conspirator acting alone must be able to commit the tort in question. Such rule, if applicable to Civil Rights actions, would permit politicians, with impunity, to persuade state officials to abuse their power in violation of the federal rights of political opponents of those who exercise such influence.

It is elementary that in determining the propriety of a complaint, the complaint must be read as a whole, and with a view to give proper effect to the intent therein expressed, rather than to defeat its purpose. As stated above, "there is no justification for dismissing a complaint * * * except where it appears to a certainty that the plaintiff would not be entitled to

relief under any state of facts which could be proved in support of his claim." (*Continental Collieries v. Shobar,* 130 F. (2d) 631, 635.)

In the instant case the complaint alleged among other things that in the petition circulated by appellant among the legislators in Sacramento, the subject matter thereof was stated in such manner that the appellee Committee was charged to have used plaintiff as an instrument to smear Congressman Franck R. Havenner as a "Red", when he was campaigning against Elmer E. Robinson as a candidate for mayor of San Francisco in 1947 and that Robinson conspired with the Committee to this end. This statement of the complaint (Transcript p. 4) made it quite clear that the interests of appellee Committee and appellee Robinson coincided in this entire matter. A copy of said petition was attached to the complaint as Exhibit "B" and made a part thereof by reference. The petition clearly involved serious charges against appellee Robinson. The complaint further alleges that appellee Tenney, before the service of the subpoena on appellant and after the content of said petition had become known to him, immediately communicated by telephone with appellee Robinson advising him of the charges contained in said petition and the stated purpose of same. (Transcript p. 5.) The complaint then states: "Then and there said defendants Jack B. Tenney and Elmer E. Robinson discussed ways and means of best thwarting the charges contained in said petition and defeating the purpose stated in said petition and agreed that a hearing should be held on the fol-

lowing day by the Tenney Committee, whereat defendant Elmer E. Robinson should appear as voluntary witness and deny the truth of the charges with reference to him and his connection with the Tenney Committee contained in said circulated petition." (Transcript pp. 5-6.) The complaint further states that at the hearing Robinson appeared as a voluntary witness, that all individual defendants except Elmer E. Robinson were sitting as members of the Tenney Committee, that the hearing of the Committee was held *"as was known to all defendants,* for the purpose and object of suppressing the criticism of plaintiff in his circulated petition and the charges therein directed against the Tenney Committee and the individual defendants, to the end that said Committee should obtain the appropriation of funds requested from the California Legislature." (Transcript pp. 6 and 7.) (Emphasis added.) Including *all defendants* this allegation included knowledge of appellee Robinson of the purpose and object of said hearing. As to the conduct of the hearing it was alleged that Robinson was permitted to and did make a lengthy unsworn statement first, and after having been sworn as a voluntary witness, was led by appellee Tenney to and did answer the different charges contained in appellant's petition whereby unbridled discretion was left to appellee Robinson in the conduct of his self-justification. (Transcript p. 7.) The transcript of the hearing before the Tenney Committee was attached to the complaint as Exhibit "F" and by reference made part of the complaint. This transcript shows the unsworn statement

of appellee Robinson from which it appears that Robinson was intensely interested in refuting the charges directed against him in the petition before the Committee which, as he well knew, had the same interests in the matter as he had and was acting as judge and accused in the same case. (Transcript pp. 45-46.) This also appears from the statement of Robinson at the hearing (Transcript p. 48): "I feel as a citizen, I am entitled to the right to refute that evidence at any time this Committee is willing to hear me. The hearing is on; this man has submitted evidence, he calls it evidence, and offers it in the record, and I demand the right to refute the statements contained in that document." Whereas appellant had made it entirely clear that he considered the hearing of the Tenney Committee as improper and consequently had offered no evidence, appellee Robinson ignored and misstated this fact because of his urgent desire in cooperation with the Committee to use this hearing as a forum for his own and the Committee's justification. All these allegations contained in the complaint or appearing from exhibits which were made part thereof by reference, must be read in connection with paragraph 13 of the complaint, which stated as to all appellees including Robinson:

> "The acts of defendants above set forth were done or participated in by said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of

> the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff."

In addition thereto paragraph 14 of the complaint alleged among other things:

> *"All defendants including defendant Elmer E. Robinson conspired for all of the aforesaid purposes and acted in furtherance of said conspiracy in the manner hereinabove set forth."* (Emphasis added.)

It can hardly be questioned that all necessary objective facts of a conspiracy were sufficiently pleaded by the allegations that appellee Tenney and appellee Robinson discussed ways and means of thwarting the charges contained in appellant's petition to the California Legislature and agreed that the holding of a hearing of the Tenney Committee with Robinson appearing as a voluntary witness denying the truth of the charges against himself and the Committee would be the best means to the end of thwarting the charges and defeating the purpose stated in the petition; that Robinson knew that the purpose and object of the hearing was to suppress the criticism of appellant to the end that the Committee acting as judge and accused in the same case should obtain the appropriation of the funds requested from the Legislature; that the purpose of all actions in question, including the agreement or understanding between appellees Tenney and

Robinson, was to intimidate and silence plaintiff and deter and prevent him from exercising his right of free speech and other federal rights. There can be no question that sufficient overt acts of appellee Tenney were alleged for the purpose of effectuating the purposes of the understanding. In appraising the understanding it must be conceded that the words uttered by appellees Tenney and Robinson alone are not decisive, but that a tacit as well as an expressed meeting of the minds to intimidate and deter appellant would be sufficient to satisfy the requirements of a conspiracy. Since the existence of a conspiracy was clearly alleged and the purposes of the conspiracy were set forth in paragraph 13 of the complaint, the sole question which can be raised is whether the facts provable under the allegations of the complaint, will or will not convince a jury that there was a conspiracy for the purpose alleged in the complaint. Even if this Court could determine whether the facts alleged could possibly convince a jury of the existence of such a conspiracy, this Court could not question that from all the facts and the whole atmosphere referred to in the complaint and to be shown by the evidence thereunder, a jury could infer that a conspiracy as alleged did exist.

With respect to Robinson's state of mind as a conspirator the allegations of the complaint clearly satisfy the requirements of the pertinent federal rule.

V.

CONCLUSION.

It is respectfully submitted that for the reasons above stated a rehearing should be granted and the judgment of dismissal reversed as to appellee Robinson.

Dated, San Francisco, California,
July 26, 1950.

MARTIN J. JARVIS,
ELMER P. DELANY,
RICHARD O. GRAW,
Attorneys for Petitioner-Appellant.

Certificate of Counsel

I hereby certify that in my judgment the foregoing appellant's petition for a rehearing with regard to appellee Robinson is well founded and that the same is not interposed for delay.

Dated, San Francisco, California,
July 26, 1950.

Martin J. Jarvis,
One of the Attorneys for Petitioner-Appellant.